Supreme Court, U.S.
FILED
JUN 14 2002
OFFICE OF THE CLERK

No. 01-1722

IN THE

Supreme Court of the United States

SAN PAOLO U.S. HOLDING COMPANY, INC.,

Petitioner,

v.

LIONEL SIMON d.b.a. LIBERTY PAPER COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT DIVISION FOUR

BRIEF IN OPPOSITION

MITCHELL B. LUDWIG
Counsel of Record
KEVIN J. STACK
ANDRÉ E. JARDINI
KNAPP, PETERSEN & CLARKE
500 North Brand Boulevard
20th Floor
Glendale, California 91203
(818) 547-5000

Attorneys for Respondent Lionel Simon d.b.a. Liberty Paper Company

174466

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Whether certiorari is appropriate to review the factual basis for the juries' verdicts and the Court of Appeal's conclusions after conducting a de novo review of the due process challenge to the punitive damage award?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are respondent, Lionel Simon, doing business as Liberty Paper Company. Liberty Paper Company is a trade name for Lionel Simon and Petitioner, San Paolo U.S. Holding Co. Inc., a Delaware corporation.

RULE 29.6 STATEMENT

Rule 29.6 is inapplicable, because respondent Lionel Simon is an individual.

TABLE OF CONTENTS

	Page
Counter-Statement of Questions Presented	i
Parties to the Proceedings	ii
Rule 29.6 Statement	ii
Table of Contents	iii
Table of Cited Authorities	iv
Statement of the Case	5
Statement of Factual Background	5
Statement of Procedural Background	12
Reasons for Denying the Writ	14
A. Certiorari Is Not Warranted Because Cooper Did Not Require De Novo Review of the Juries' Factual Findings Or The Conclusions Reached By The Court Of Appeal	14
B. Certiorari Is Not Warranted Because San Paolo's Petition Does Not Establish Compliance with Supreme Court Rule 10 ..	18
C. Certiorari Is Not Warranted Merely Because the State Appellate Court Also Applied California's Passion and Prejudice Standard to the Award	19
Conclusion	21

TABLE OF CITED AUTHORITIES

Page

Cases:

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) 1, 3, 15, 17, 19, 21

Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) ..... *passim*

Haslip v. Pacific Mutual Ins. Co., 499 U.S. 1 (1991) 19

Las Palmas Associates v. Las Palmas Center Associates, 235 Cal. App. 3d 1220, 1 Cal. Rptr. 2d 301 (1991) 19, 20

Neibel v. Trans World Assur. Co., 108 F.3d 1123 (9th Cir. 1997) 17

Statute:

California Penal Code Section 182(a) 17

California Penal Code Section 484(a) 17

Rules:

United States Supreme Court Rule 10 ..... 5, 18

United States Supreme Court Rule 10(b) 18

United States Supreme Court Rule 10(c) 18

Plaintiff/Respondent Lionel Simon d.b.a. Liberty Paper Company ("Simon") respectfully submits this brief in opposition to the petition for Writ of Certiorari filed by defendant and petitioner San Paolo U.S. Holding Company, Inc. ("San Paolo"), in which it is seeking review of the California Court of Appeal's unpublished decision in *Simon v. San Paolo*, case number B121917 (California Court of Appeal, November 7, 2001).

San Paolo is a disgruntled litigant who twice lost at the trial court, California Court of Appeal and California Supreme Court. San Paolo was also denied a stay of execution on the judgment by this honorable Court even though this Court also granted review without hearing or briefing, vacated the appellate court judgment, and remanded the case for consideration in light of the standard of review set forth in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

This case has an unusual factual and procedural history and is a terrible candidate for setting precedent. The review process of the California Court of Appeal was performed exactly as this Court suggested, reviewing the factual record supporting the verdict to determine if it was "clearly erroneous" and conducting a de novo review of the due process analysis articulated by this Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

In a misleading and self serving manner, San Paolo wrongly asserts that the California Court of Appeal did not properly apply the standard of review set forth in *Cooper* even though the Court of Appeal specifically stated it was doing so and discussed the process in the written opinion on six occasions. The Court of Appeal stated it was applying a

de novo or independent review at pp. 2, 7, 16, 17, 25 and 27 of the November 7, 2001, opinion. San Paolo attempts to rewrite the appellate review process by asserting that this Court mandated, in essence, a retrial of the lawsuit before the appellate court whenever a constitutional challenge is made to a punitive damage award. Contrary to San Paolo's arguments, this Court never imposed such an onerous task on the appellate system.

Appellate courts do not handle the functions of the trial court. Indeed, appellate courts are at a disadvantage with respect to the determining the facts supporting the underlying tort claims or the degree of reprehensibility of the wrongdoer's actions because they are only reviewing the cold record without the opportunity to consider the demeanor of witnesses. *See generally*, *Cooper*, *supra*, 532 U.S. at 440. Certainly, the trial judge is in the best position to perform that task, particularly when the trial court, as it did in this case, ruled on a motion for new trial. Wholesale discounting of the jury's findings could result in a violation of the Seventh Amendment's Reexamination Clause. Determining questions of fact before and after *Cooper* remain with the trial court. As this Court stated in *Cooper*, *supra*, 532 U.S. at 440 n.14:

> While we have determined that the Court of Appeals must review the District Court's application of the *Gore* test *de novo*, it of course remains true that Court of Appeals should **defer** to the District Court's findings of fact unless they are clearly erroneous. (Citations omitted and emphasis added.)

The appellate court's role is to review the factual findings of the trial court, whether implied or express, under the "clearly

erroneous" standard and to apply those facts "de novo" to the three pronged test enunciated in *Gore*. It is a de novo review of the *Gore* factors not a de novo review of the facts supporting the judgement. In its November 7, 2001, opinion, the California Court of Appeal recognized this important distinction stating:

> Our original judgment, entered on August 28, 2000, was vacated by the United States Supreme Court on May 29, 2001, and the cause was remanded to determine de novo whether the award of punitive damages violated the defendant's right to due process under the federal Constitution. **We have now reconsidered the matter, applying a de novo standard of review to the due process issue**, and we again affirm the judgment. (Emphasis Added.)

(Pet. A-2)[1]

The appellate court correctly applied the de novo standard **to the due process issue** and not to the findings of fact. San Paolo argues, as it must since their conduct was so egregious, that the facts supporting the verdict should have been decided differently, but the court ignored their arguments.[2] *Cooper* did not require the reviewing court to

1. All references to "Pet." are to the Appendix attached to the Petition.

2. A substantial portion of San Paolo's petition is devoted to comparing the appellate court's first opinion with the second suggesting that the appellate court ignored this Court's requirement to conduct a de novo review because the written decision appears to

(Cont'd)

disregard the facts. San Paolo can not change the facts in this matter. The Court of Appeal understood this distinction:

> In its supplemental brief after remand, San Paolo seems to suggest that the de novo review of constitutional issues mandated by the Supreme Court requires a de novo resolution of conflicting factual issues. We disagree. Although the Court held that we must determine the constitutionality of a punitive damage award under a de novo standard of review, it explained . . . that reviewing courts must independently apply a constitutional standard to the facts of the trial court unless they are "clearly erroneous."

(Citation to *Cooper*, *supra*, n.14 and citations omitted).

> Here, the trial court made no factual findings of its own, and by denying the motion for new trial, the trial court did not disturb any of the jury's factual findings. Thus, for the purpose of our review of the due process issues, we shall apply the *Leatherman* standard to the express and implied factual findings of the jury, and reject them only if they are clearly erroneous.

(Pet. A-7-8.)

(Cont'd)

be similar to the original opinion. San Paolo seems to ignore the fact that both San Paolo's appeal **and** Simon's cross-appeal raised other issues which were not affected by the Court's "GVR" Order. Thus, it is not surprising that the appellate court would repeat the facts upon which it based its decision and the analysis from its initial review.

San Paolo contends that the Court of Appeal either did not correctly apply the standard in this case or that the Court of Appeal's factual conclusions were erroneous. At best, therefore, San Paolo is arguing that the Court of Appeal's conclusions were not correct. Disagreements with appellate court conclusions are rarely the subject of United States Supreme Court review, particularly where the rule of law was properly stated.

As stated in Rule 10 of the Rules of the Supreme Court of the United States: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." San Paolo's asserted error is nothing more that an allegation of "erroneous factual findings or the misapplication of a properly stated rule of law."

Moreover, this case presents no authentic conflict of law, no unsettled question regarding due process and no new Constitutional issues for this Court to address. Accordingly, there is no basis for review and costs should be awarded to Simon.

STATEMENT OF THE CASE

Statement of Factual Background

In the evening of June 12, 1996, San Paolo and Simon executed an agreement titled "Letter of Intent" (the "Agreement") whereby Simon and San Paolo agreed that all essential terms were agreed to and that the parties could then complete a sale of the Property. (Joint Appendix In Lieu of Clerk's Transcript "JA" 1864-1871.) Simon testified that he had waited patiently for almost *two* years to buy the Property and it was perfectly and *uniquely* suited for his business

operations and it would generate rental income. (RT 31-34, 1229, 1231-1235; SJA 2424.) Simon was told by the broker that the Agreement was a binding contract and that it was the fastest way to get San Paolo into escrow because of the very short escrow period of about two weeks. (RT 69; SJA 2271-2273.) Contrary to San Paolo's claim, the Agreement did not contain any express statement that it was nonbinding. (SJA 2274-2281.) Simon testified and introduced evidence that the Letter of Intent was originally drafted with an express statement that it was binding but was later *fraudulently* altered to remove the express statement. (RT 68-70; SJA 2271-2273.)

The Agreement stated it contained the "essential elements of this transaction and that any minor modifications or further instructions shall be identified and reflected in the escrow instructions." (SJA 2274-2281.) Paragraph M of the Agreement stated that "*Seller and Buyer agree to exclusively negotiate upon execution of this letter.*" (SJA 2280.) William Atha ("Atha"), the listing agent for San Paolo and the broker on the sale, testified that the exclusive provision was to prevent the parties from negotiating with anyone else during the exclusive period and that Simon wanted the provision to ward off competing offers. (RT 240-241.) At trial, San Paolo's officers, Duane King ("King") and William Schack ("Schack"), admitted that they were bound by paragraph "M" and not permitted to negotiate with any buyer other than Simon during the "exclusive period." (RT 355, 486-487, 1434-1435, 1441-1443.)

In addition, during the first trial, each party's expert witness, regarding Letters of Intent, testified that parties are bound by exclusive negotiation clauses. (RT 594-596; 804-805.)

In reliance on the Agreement and the promises contained therein, Simon hired Donald Mitchell, a lawyer, to whom he paid a nonrefundable retainer of $5,000, and began his efforts

to close the transaction. (RT 82-82, 104-105; SJA 2350.) Simon also hired an inspection company and arranged for financing. (RT 93, 106-112; SJA 2293.) Simon testified he was ready, willing, able and eager to close the deal. (RT 65-67, 81-83, 88.) Atha, the broker, also agreed that Simon was committed to closing the transaction. (RT 217, 219 and 228.) Simon had all of the required documents ready to be delivered to King, but King, through Atha, expressly told him that he would refuse any delivery. (RT 1252-1253, 1356, 1392-1393.)

The next morning, June 13, King demanded that Simon shorten his due diligence period and release his deposit from the agreed date of Wednesday June 26 to Friday June 21. Simon agreed to move the period to Monday June 24, which was only one business day from San Paolo's date of the 21st (a weekend intervened) but required the weekend to complete his due diligence on such a short escrow. When Simon demanded that escrow open, King turned the dispute against Simon by asserting that Simon was refusing to perform and thereafter at approximately 5:00 p.m. on the 13th, rather than continue to resolve this issue to complete the transaction as they were bound to do in good faith, King terminated the deal. (RT 1257-1258.) At the time of these events, San Paolo's agent, Atha, wrote that San Paolo's position was unreasonable. (RT 1345-1347.) He stated as follows:

> [I]t seems that the bank's position of requiring funding no later than the 21st is unreasonable. Buyer has moved forward in 'good and, better faith'.

(RT 1346-1347.) The evidence established that San Paolo had no valid reason to insist that the deposit be released on the 21st, rather than on the 26th. For reasons which became

clear later, King never sought approval of the 24th. Further, notwithstanding that escrow was scheduled to open only hours later, King and Schack conceded San Paolo never prepared any memoranda seeking approval of Simon's transaction from their New York office as they were required to do by the Agreement and as was their custom and practice. The evidence established that New York approval of the transaction in writing was never sought. (RT 397-398, 1455-1456, 1461-1462, 1605-1609 and 1614; SJA 2275.)

The evidence demonstrated that, during the exclusive negotiation period, San Paolo wrongfully continued to negotiate the sale of Property with another buyer, 816 Partners, L.L.C. ("816 Partners") who were represented by Robert DeVogelaere ("DeVogelaere"), a broker and a managing member of 816 Partners. (RT 523-525, 534.) The evidence demonstrated that on June 12th, 816 Partners prepared a written offer to purchase and delivered it to King. On June 13th, it was signed by King on behalf of San Paolo. King signed it before he had terminated Simon's right to be exclusively negotiating to buy the Property. (JA 1901-1916.) Thereafter, King began his pre-textual renegotiation with Simon in order to discourage him from attempting to close the deal. At approximately 5:00 p.m. on June 13, 1996, King terminated the Agreement. (RT 102, 364-367, 1254, 1263-1264, 1267-1268, 1344-1347, 1459-1461, 1616; SJA 2315-2316.)

After Simon filed suit on June 21, and recorded a lis pendens, San Paolo immediately filed a motion to expunge. San Paolo submitted several declarations under oath for use at the hearing. Both King's and DeVogelaere's declaration admitted to the enforceability of the exclusivity provision but *fraudulently* stated that it was not violated.

DeVogelaere's declaration stated that, because King *had advised* him that he was exclusively negotiating with Simon, they could not discuss the sale of the Property. DeVogelaere stated, under oath, that he did not call King until June 14, after Simon's deal was terminated. The declaration of DeVogelaere also stated that his negotiations with San Paolo did not take place until the late afternoon of June 14 conveniently after Simon's Agreement was supposedly terminated. (RT 538-542, 568-569, 1558-1559.) As explained below, DeVogelaere later admitted that his declaration false.

King's declaration stated that they neither met nor communicated with each other during the exclusive period. (RT 373-375, 464-465, 538-542, 1436-1438, 1512-1513, 1558-1559.) King stated that he first met with DeVogelaere on June 14, 1996 when they signed their agreement. (*Ibid.*) This declaration was also intentionally false. The trial court relied on these false declarations and expunged the lis pendens. (RT 373-375, 464-465, 538-542, 1271-1272, 1435-1438, 1512-1513, 1558-1559.)

At trial, San Paolo's scam unraveled. Both King and DeVogelaere conceded that their declarations were false. Simon introduced both King's and DeVogelaere's telephone records which documented a multitude of calls between DeVogelaere and King immediately prior to the execution of Simon's Agreement and thirteen (13) telephone calls during the exclusive negotiation period. (RT 377-382, 464-465, 534-542, 568-569, 1435-1439, 1508-1509, 1511-1512, 1554-1555.) DeVogelaere admitted that he was discussing the acquisition of the Property. (RT 508, 527, 534-542, 568-569, 1550, 1554-1555.)

San Paolo also enlisted the assistance of the broker, Atha, to *conceal* King's repudiation of the exclusive negotiation clause. Atha's testimony and notes reflect that he was instructed by King, between 1:30 p.m. and 3:30 p.m, on June 13, 1996, during the exclusive negotiating period, not to advise Simon that King was violating his promise to exclusively negotiate. Atha wrote in his notes:

> Do not tell him — Lionel — that Duane is talking to any other deal in building —

(RT 242, 244-245, 1350, 1352; SJA 2353.)

DeVogelaere further testified that his declaration was prepared by San Paolo's counsel. (RT 542, 1558-1560.) DeVogelaere further admitted, contrary to the declaration, that King never told him that he was bound to exclusively negotiate with Simon and, thus, continued to inquire about buying the Property. DeVogelaere also admitted that the date of his meeting with King was falsely stated in his declaration; it took place on June 13, not in the late afternoon of June 14. (RT 538-542, 568-569, 1558-1559.)

King was also shown to have lied about when and how he executed the 816 Partner's Agreement.

Escrow records for the 816 Partners' sale were also introduced into evidence. These records revealed that "extra money" was placed into escrow, beyond the proceeds necessary for the actual sale. The only version of the escrow closing statement produced to Simon reflected that $69,248.38 was overpaid into escrow by the buyer's lender. (SJA 2351.) A letter to the escrow company, prepared by San Paolo's attorneys, discussed apparently a different version of the closing statement where as much as $95,000 was overpaid into escrow by the buyer. (RT 1462-1464.) No evidence was introduced to explain

the reason why counsel wrote the letter or why the irregularity existed, except that the "extra money" supposedly went back to the buyer. DeVogelaere, who at least initially received the money, testified that having the extra money in escrow was indeed "very uncommon." (RT 1586.)

San Paolo's tangled web of deception did not end, however, when 816 Partners entered escrow on June 14. Three days later, on Monday, June 17, 1996, King, fearing that Simon might file suit to block the sale, instructed Atha to renew their negotiations with Simon. At King's behest, Atha called Simon several times during that week, providing Simon with updates on King's efforts to get approval for their renewed deal from New York and Italy, where the parent company was located. San Paolo's transparent intent was to forestall Simon from filing suit, and blocking the sale of the Property, which was originally scheduled to close on June 20. (RT 227, 249-256, 1344-1346, 1353-1356, 1388-1389, 1392-1393; SJA 2323-2330.) Simon, now sensing that another sale was about to close, and that he was being defrauded, filed suit on June 21, 1996. He also recorded a lis pendens temporarily blocking the sale.

Simon testified that, as a result of the misconduct of San Paolo, he was deprived of this very unique five-story property that was specially situated and perfect for his business of selling paper products and printing to local offices. Simon testified he intended to use only a portion of the building to house his own business. The remainder would be leased to commercial tenants. (RT 31-33, 1229, 1231-1235.) The improvements to the upper floors were of high quality. The Property was unique in that it was the only five-story building that would ever be likely to come on the market in the financial district of downtown where the other office buildings are skyscrapers. Indeed, this was truly a once in a lifetime opportunity for a small businessman like Simon who had followed the sale of the property for two years.

Simon's appraisal expert, David M. Rosenthal, MAI, testified that the market value of the Property was $1.5 million as of June 13, 1996. Simon's offer was for $1.1 million, thus reflecting a *lost profit of $400,000*. (RT 1678, 1703, 1710-1711, 1734; SJA 2274-2281.)

As to San Paolo's wealth, their financial statements demonstrated that the company had estimated net assets at liquidation value of approximately $50 million at the first trial. (SJA 2425-2436.)

Statement of Procedural Background

On June 21, 1996, Simon filed his complaint against San Paolo. The complaint included causes of action for False Promise, Breach of Contract, Specific Performance, and Breach of the Implied Covenant of Good Faith and Fair Dealing. (JA 1-18.) A lis pendens recorded against the Property was expunged on July 23, 1996. The only two causes of action which went to trial were the theories of False Promise and Breach of Contract. The first trial resulted in a verdict in favor of Simon on the claim for false promise, the jury finding that:

(1) San Paolo made a false promise about a material matter to Simon, i.e., promise to exclusively negotiate with Simon to complete a sale; (2) San Paolo did not intend to perform the promise at the time it was made; (3) San Paolo made the promise with an intent to defraud Simon; (4) At the time San Paolo made the promise, Simon was not aware of its intention not to perform; (5) Simon acted in reliance on the promise; (6) Simon was reasonably justified in relying on the promise; (7) San Paolo's promise caused Simon damage, and that such damage was $5,000; (8) That there

was clear and convincing evidence that San Paolo committed malice, oppression or fraud in the conduct on which the jury based its finding of liability for false promise. (JA 615-617.) Simon asserted that the harm caused by San Paolo far exceeded the $5,000 and included the lost value of the Property.

The jury also decided that punitive damages should be assessed against San Paolo and determined this figure to be $2,500,000. (JA 618.)

San Paolo filed its motions for a judgment notwithstanding the verdict and for a new trial, or, in the alternative, for a remittitur on August 21, 1997. (JA 619-776, 1050.) The trial court granted the motion for new trial unless Simon consented to a reduced damage award of $250,000. (JA 1228.) Simon rejected the remittitur and elected to proceed to a second trial. (JA 1269-1271.)

On March 9, 1998, the new trial went forward on the issue of the amount of punitive damages to be awarded. The *second jury to hear this case* returned a verdict of $1,700,000 in punitive damages against San Paolo. (JA 1817-1825.) After the conclusion of the second trial, San Paolo again filed a motion for new trial, or, alternatively for a remittitur, which the trial court denied. (JA 1518-1667; RT 1994-2003.) Under California law, on a motion for new trial, the trial judge conducts a de novo review of the evidence. (Cal. Code Civ. Proc. § 657.)

San Paolo's appeal, and Simon's protective cross-appeal followed this ruling. (JA 1829-1834, 1851-1853.) The Court of Appeal affirmed the award of punitive damages in an unpublished opinion which was filed on August 28, 2000. San Paolo filed a petition for rehearing which was denied by

the Court of Appeal. San Paolo filed a petition for review to the California Supreme Court, which was denied en banc on December 13, 2000.

On May 29, 2001, this Court granted review, vacated the appellate court opinion and remanded without argument directing the appellate court to reconsider the decision in light of this Court's decision in *Cooper*, *supra*[3]. On remand, the California Court of Appeal received further briefing on the impact of *Cooper*, *supra*, and oral argument was held. On November 7, 2001, the California Court of Appeal issued its second unpublished decision affirming the trial court verdict. A subsequent Petition for Review to the California Supreme Court was denied. This Petition followed.

REASONS FOR DENYING THE WRIT

A. Certiorari Is Not Warranted Because Cooper Did Not Require De Novo Review of the Juries' Factual Findings Or The Conclusions Reached By The Court Of Appeal

San Paolo argues that the application of a deferential standard of review to the factual findings is contrary to this Court's decision in *Cooper*. San Paolo misconstrues this Court's holding in *Cooper*. San Paolo argues that the appellate court was ordered to conduct a de novo review of the evidence. San Paolo is clearly wrong. Appellate courts apply deferential standards to factual findings in varying degrees (substantial evidence, abuse of discretion, clearly erroneous, etc.). *Cooper* held that factual findings are to be upheld unless "clearly

3. San Paolo's request that this Court stay Simon's execution on the judgment pending its determination of the merits of the first Petition was denied by this Court. Simon has received payment on the judgment and filed a satisfaction of judgment with the Los Angeles Superior Court.

erroneous." *Id.* at 440 n.14. This process is consistent with the Court's requirement that the reviewing court not defer to the trial court as to the **amount** of the punitive damage award. That process was preserved by the Court of Appeal in this case.

De novo review **of the findings of facts to the due process analysis** was applied in this case. The Court of Appeal stated it was applying a de novo or independent review at pp. 2, 7, 16, 17, 25 and 27 of the November 7, 2001, opinion. San Paolo was not denied due process as the Court of Appeal applied the facts as found by the trial court "de novo" to the *Gore* factors before independently concluding that the amount was within constitutional limits. Beginning at page "A-16" of the opinion, the Court examines the verdict in light of *Gore.* In doing so, the appellate court stated :

> Discussing only evidence favorable to its position, San Paolo contends that its conduct was not "particularly reprehensible," because it caused only 'nominal' economic harm and was a single act. Further, it contends that by the time of trial King was no longer employed by San Paolo, thus such conduct was unlikely to recur. **Our review of all of the evidence leads us to the opposite conclusion.** We do not agree with San Paolo's characterization of its wrong as "just a business deal gone awry." "Trickery and deceit" are reprehensible wrongs, especially when done intentionally through affirmative acts of misconduct. (Citations omitted) **We have no difficulty in independently concluding that the conduct of San Paolo's officer was reprehensible and that punitive damages were warranted in this case.** (Emphasis Added.)

(Pet. A-16-17.)

The Court of Appeal further found that King's fraudulent conduct was "continuous and intricate." (Pet. A-17.) King "filed two false declarations." (Pet. A-17.) "Lying to the trial court about the wrongful conduct may be considered in measuring reprehensibility." (Pet. A-19.) "Concealment of evidence of fraudulent intent is reprehensible . . ." (Pet. A-19.) "King's deception at trial served to demonstrate just how false he was prior to trial, and thus, how reprehensible his conduct was." (Pet. 1-19.) Further, in reviewing the evidence to support San Paolo's assertion that this will never happen again, the Court of Appeal rejected the notion finding:

> San Paolo did not terminate Kings employment, or distance itself in any way from King's conduct. King was never reprimanded, warned, or counseled; he suffered no job or salary action whatsoever, and even got a bonus that year. It is far from certain that San Paolo will change its policies to discourage similar conduct in the future.

(Pet. A-19.)

These findings demonstrate that the Court of Appeal reviewed the facts to determine if they were clearly erroneous.

The Court of Appeal also reviewed de novo the ratio of punitive damages to total harm suffered by Simon. (Pet. A-19-23.) The Court found that the correct ratio based on its review of the evidence (there was no express or implied finding on this point by the jury) was just over 4 to 1, rejecting San Paolo's 340 to 1 analysis. The Court of Appeal found that the amount of financial harm suffered by Simon was at least $400,000. This specific finding was that of the appellate

court not the jury. This number was inferred by the Court of Appeal from its independent review of the evidence.

The third factor set forth in *Gore* of the difference between punitive damages and civil and criminal penalties was also reviewed de novo. Interestingly, the Court of Appeal noted that San Paolo never addressed this factor in its opening brief on appeal and then objected to Simon's comparisons to civil penalties in deceptive trade practice and perjury cases. (Pet. A-24.) The Court of Appeal found that San Paolo had fair notice of the consequences of its fraud by comparing the penalty of imprisonment for committing a felony such as those set forth in California Penal Code Sections 182(a) and 484(a), which govern the crimes of conspiring "to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform such promises" and "knowingly and designedly, by any false or fraudulent representation or pretense, defraud[ing] any other person of money . . ." *Neibel v. Trans World Assur. Co.*, 108 F.3d 1123, 1131 (9th Cir. 1997) (Under California law a party has fair notice that substantial punitive damages could be awarded, comparing the civil remedy with felony convictions based on fraud.) (Pet. A-24-25.)

The Court of Appeal found that "[its task] has been to determine de novo whether the award is so grossly disproportional to the gravity of the wrong as to violate due process. (Citation to *Cooper* Omitted.) Having undertaken such a review, we conclude that it was not." (Pet. A-25.) Accordingly, it is clear that a thorough and comprehensive analysis was performed by the Court of Appeal.

B. Certiorari Is Not Warranted Because San Paolo's Petition Does Not Establish Compliance with Supreme Court Rule 10

San Paolo has also not established compliance with any of the written considerations governing Supreme Court review as specified in Supreme Court Rule 10(b) or 10(c). These sections provide that "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeal" and that "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." San Paolo has merely repeated constitutional buzzwords without substance. San Paolo fails to adequately describe or explain how or in what manner the state appellate court's decision decides an important federal question or how it conflicts with any other court's decision. San Paolo's claim that other jurisdictions are wrestling with the application of *Cooper* is not true. The cases cited by San Paolo simply discuss punitive damages and in some cases *Cooper*, but do not create conflicting applications of the rule. There is literally no showing of any practical and real significance to the alleged conflict created by the California Court of Appeal decision in this case. Simon asserts that these hollow pronouncements by San Paolo justify a denial of review.

This is merely a case brought by a disgruntled litigant in a fact specific determination that affects only the litigants to this action. San Paolo's professed desire to settle important procedural issues of law is disingenuous.

C. Certiorari Is Not Warranted Merely Because the State Appellate Court Also Applied California's Passion and Prejudice Standard to the Award

San Paolo also raises an objection to the Court of Appeal's analysis of the award in light of California's "passion and prejudice" standard for controlling excessive awards. This argument is irrelevant because the court's analysis was in addition to, not in lieu of its analysis of the *Gore* factors. In this case the award satisfied both standards.

In raising this argument, San Paolo incorrectly states that because one lower state court described the "passion and prejudice" test as a species of the substantial evidence test, it violates due process. California's "passion and prejudice" test offers the same level of deferential review to the findings of fact as *Cooper* with respect to its "clearly erroneous" standard but independent consideration of the actual award. San Paolo confuses the determination of fact with the examination and evaluation of the *amount* of damages awarded. The California Court of Appeal previously addressed the unique role that the "passion and prejudice" standard has in examining punitive damage awards. The "passion and prejudice" test is considered an "additional safeguard" to ensure that the jury's award has not exceeded constitutional limits. *Las Palmas Associates v. Las Palmas Center Associates*, 235 Cal. App. 3d 1220, 1257-59, 1 Cal. Rptr. 2d 301 (1991). In *Las Palmas*, the court held that the degree of review afforded by the "passion and prejudice" test at the trial and appellate level satisfies federal due process concerns, citing to the United States Supreme Court decision in *Haslip v. Pacific Mutual Ins. Co.*, 499 U.S. 1 (1991).

At the trial court level, the judge sits as an independent trier of fact and evaluates the demeanor and credibility of the witnesses and weighs the evidence. (*Id.* at 1258.) At the appellate level this standard places responsibility on the court to "intervene when the verdict is so palpably excessive to raise the presumption of passion and prejudice." (*Id.* at 1258.) Applying this standard, the *Las Palmas* court stated:

> Application of the "passion and prejudice" standard does not occur in a vacuum, but is measured against the identical criteria utilized by the jury: reprehensibility of defendant's misdeeds, the ratio between the compensatory and punitive damages, and the relationship between the punitive damages and defendant's net worth. [Citations.]

Id. at 1258. Thus, it affords the appellate court the opportunity for a de novo review. The *Las Palmas* court concluded by noting:

> [This] quantum of critical evaluation thus makes certain that punitive damage verdicts will be limited to that amount of money necessary to accomplish the public policy of punishment and deterrence. In sum, the "passion and prejudice" test affords in posttrial proceedings and on appeal the same general degree of scrutiny as found in the Alabama review process [referring to *Haslip*, *supra*].

Id. at 1258.

It is clear, therefore, that California's "passion and prejudice" test is for all practical purposes a species of de novo appellate review, similar to that required by *this Court in Cooper*. The practical application of the "passion and prejudice" standard will, in all cases, result in an independent review for the defendant.

As mentioned previously, San Paolo's argument regarding the California "passion and prejudice" test is irrelevant because the Court of Appeal conducted a de novo review of the due process challenge to the punitive damage award utilizing the *Gore* factors (reprehensibility, ratio, and comparison to civil and criminal fines).

CONCLUSION

For all of the foregoing reasons, respondent respectfully requests that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MITCHELL B. LUDWIG
Counsel of Record
KEVIN J. STACK
ANDRÉ E. JARDINI
KNAPP, PETERSEN & CLARKE
500 North Brand Boulevard
20th Floor
Glendale, California 91203
(818) 547-5000

Attorneys for Respondent
Lionel Simon d.b.a.
Liberty Paper Company